Regulating Triangular Employment

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Regulating for Decent Work
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The issues

- Triangular employment involves three relationships: employee – agency, agency – client (commercial); employee – client,
- Partial outsourcing
- Cannot be resolved by conventional contractual interpretation (eg UK)
- Regulation requires understanding of contractual basis
- Relationship specific challenges of regulating TE and wider difficulties of labour law compliance/enforcement
- Overlap with labour intermediation role –
  - Absence of public labour intermediary role (apartheid institutions not replaced)
  - Justification for “placement” functions do not require TE.
South Africa: Timeline

- 1983 Amendments: labour broking recognised and broker “deemed” to be employer of employees it supplies to client for reward and remunerates. No employee status when not placed
- Rationale for regulation: brokers designing arrangements with employees to avoid regulation,
- Response: “bakkie” brigade – small agencies that cannot be held accountable
1995 Labour Relations Act

• 1995/1996 Post apartheid LRA enacted extending rights to employees and establishing new institutions – CCMA and Labour Court

• Labour Broking (renamed as temporary employment services) but requirement for registration omitted

• TES remains employer of employees it places but client/user joint and severally liable for compliance with statutory minimum standards and collective agreements,
  – J&SL not extended to unfair dismissal protections and employment contracts,
  – J&SL interpreted as a default liability – client can only be sued if TES fails to comply with court order
2002 Amendments

- In aftermath of LRA widespread use of fraudulent “independent” contracting for labour law avoidance
- 2000-2 judicial and legislative response: courts begin to scrutinise employment relationship and presumption of employment for low-paid workers introduced;
- Consequence: massive increase in number of TESs and use of placements for indefinite (permanent) employment
- DOL research (2003) identifies externalisation (in particular use of TESs) as major driver of informalisation (rather than casualisation)
- LRA created the motive and the opportunity for avoidance
- Placed employees without security of employment and paid less than direct employees
NAMIBIA

• 1988 Labour Code does not deal with labour hire
• SA firms establish operations using “SA” model – TES as employer by contractual arrangement
• 2004 new Labour Code passed but does not come into effect
• Uses SA approach as template but in addition
  – Employee remains employed by TES between placements
  – J&SL extends to dismissal and contracts
  – Employee can sue TES and/or client
• Rejected in 2007 – labour prohibited – “No person may employ any person in order to hire them to another”
• High Court upholds that this does not breach constitutional right to engage in profession – Court views client as unlawful interposition in contract between agency and employer
ISSUES

• Need for **regulatory framework** (registration/ licensing etc.) – role of self-governance
• **Two basic approaches** to regulation
  – limited application
  – permit and protect
• Limited application issues
• Need to define sectors/ activities in which TE permitted (substitutes, temporary work, emergencies, high skilled, high pay)
  – Creates boundaries which may give rise to disputes/ avoidance/ perverse incentives
  – Real/ perceived inflexibilities
  – Need to justify impact on existing rights (least intrusive method of regulation) – constitutional challenge
Security of employment

• Rationale for “deeming” TES as employer not appropriate for indefinite placement –
• Indefinite placement - termination by client amounts to dismissal
• “Temp” – should be employee of TES even when not placed
• What rights for employee in respect of TES? Move away from “labour pool”
• Linked issues –
  – probation – arguably major disincentive to hiring -how to regulate
  – reduced obligations during probation versus qualifying period
  – use of “direct” fixed term contracts – move from procedural to substantive “purposive” protection
Equality

- SA does not have “equal pay” clause – claims must be brought as discrimination on listed (gender, race etc) or analogous ground
  - “work (contractual) status” not a prohibited ground for unfair discrimination
- High wage inequality (apartheid wage gap) yet minimal wage discrimination litigation
- Reasons: comparators/ difficulties for employees
- Role of state agency/ Commission
- **Collective bargaining**/ organisational rights – employee should be able to assert against agency and/ or client
- **Minimum wages** – close sectoral gaps